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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1478

OCTOBER TERM, 1973

AMADEO AUGUSTO LUCIANO SANTELISES, JR.,

Petitioner,

-against-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRUIT

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above cause on January 4, 1974, the opinion of the Court of Appeals is reported in ——F.2d—— (1974).

DECISION BELOW

FIRST: The Judgment of the United States Court of Appeals for the Second Circuit is contained in the Appendix.

SECOND: The order sought to be reviewed was entered on October 9, 1967 by a Special Inquiry Officer of the Immigration & Naturalization Service, and was affirmed by the Board of Immigration Appeals on September 18, 1968. The decision was affirmed by the Court of Appeals on January 4, 1974.

Jurisdiction to review in the matter sought herein is conferred upon this Court by 28 U.S.C., Section 1254(1).

THIRD: Questions presented for review are as follows:

(a) Whether deportation of Petitioner as an alien convicted under 18 U.S.C. Section 1546, would constitute cruel and unusual punishment for a criminal offense in violation of the Eighth Amendment to the Constitution.

(b) Whether the deportation of petitioner as an alien convicted under 18 U.S.C. Section 1546 constitutes the imposition of an additional penalty for a criminal offense based upon alienage and a denial to petitioner of equal protection of the laws and due process of law.

FOURTH: The statutory sections which this case involves are as follows: Immigration & Nationality Act, 66 Stat. 163 (1952), as amended: Section 241(a)(5), 8 U.S.C. 1251(a)(5); Section 402(a), 18 U.S.C. 1546.

STATEMENT OF THE CASE

FIFTH: The petitioner is a lawful permanent resident alien who resides in the United States with his wife and American citizen child. He entered the United States for permanent residence in 1960. In 1965, petitioner was convicted in the United States District Court for the Southern District of New York for violation of 18 U.S.C. Section 1546. The counts in the indictment alleging violation of 18 U.S.C. Section 1546, to which petitioner pleaded guilty, charged, in effect, that the petitioner had assisted others in obtaining immigrant visas by furnishing them with employment letters and affidavits of support which contained erroneous statements of fact. In January 1966, the petitioner was given a suspended sentence and was placed on probation for a period of one year. The period of probation was satisfactorily completed on January 27, 1967.

On June 9, 1966, deportation proceedings were commenced by the Immigration & Naturalization Service on the ground that petitioner is mandatorily subject to deportation pursuant to Section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(5), as a person who has been convicted under 18

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U.S.C. 1546, and was found deportable under that section, from which there is no administrative relief available. On October 9, 1967, an order was entered by a Special Inquiry Officer of the Immigration Service directing the petitioner's deportation to the Dominican Republic. The order of deportation was affirmed by the Board of Immigration Appeals on September 18, 1968, and by the Court of Appeals for the Second Circuit on January 4, 1974.

BASIS FOR FEDERAL JURISDICTION

SIXTH: The Federal statute which formed the basis for the deportation proceeding was the Immigration & Nationality Act, 66 Stat. 163 (1952), as amended, 8 U.S.C. 1101 et seq.; jurisdiction was vested in the United States Court of Appeals for the Second Circuit by virtue of 8 U.S.C., Sec. 1105(a).

REASONS FOR ALLOWING THE WRIT

SEVENTH: *The issues presented by the instant petition are of great Constitutional significance and should be determined by this Court.*

The issues presented in the present case raise serious and fundamental constitutional questions concerning the nature of due process of law, equal protection of the laws, and the concept of punishment for infraction of law. The resolution of these issues will affect not only petitioner, but millions of aliens who are lawful permanent residents of the United States.

a. Deportation of Petitioner Would be Cruel and Unusual Punishment in Contravention of the Eighth Amendment to the Constitution

In its opinion herein, the Court of Appeals rejected "out of hand" petitioner's claim that deportation constitutes cruel

and unusual punishment. Such determination was based upon the cases cited by the Court holding that deportation is a civil procedure and, therefore, not a penalty.

Petitioner submits that the concept that deportation is not a punishment or penalty is a "mammoth fiction" which should be reviewed by the Supreme Court. See Navasky, *Deportation as Punishment*, 27 U. Kansas City L. Rev. 213 (1959).

Petitioner was a lawful permanent resident alien convicted of violating 18 U.S.C. Section 1546. Such conviction was the exclusive basis for the order of deportation entered against him pursuant to Section 241(a)(5) of the Immigration & Nationality Act, 8 U.S.C. 1251(a)(5). Once a proceeding is commenced, the statute directs that an alien convicted under 18 U.S.C. Section 1546, be deported without any possibility of waiver or administrative relief.

Petitioner submits that the relevant portion of 8 U.S.C. 1251(a)(5) is clearly a penal provision in scope and intent. It imposes the additional penalty of deportation upon those aliens convicted under 18 U.S.C. Section 1546.

The present factual and legal situation is directly analagous to the case of *Trop v. Dulles*, 356 U.S. 86 (1958) in which the Supreme Court held unconstitutional a statute authorizing expatriation of American citizens convicted by a military court-martial of desertion from the United States Army in war time and given a dishonorable discharge. The major plurality opinion written by Chief Justice Earl Warren held that the involved sanction constituted a penalty and that such penalty was cruel and unusual within the meaning of the Eighth Amendment. In so concluding, the opinion devoted extensive consideration to the Government's contention that the denationalization statute [Section 401(g) of the Nationality Act of 1940, as amended, 8 U.S.C. 1481(a)] was a statute designed merely to regulate nationality which did not impose a penalty, and that constitutional limitations on the power of Congress to punish were, therefore, inapplicable. In concluding that a penalty was, in fact, intended, the Court noted that constitutional adjudication may not be controlled by the "labels pasted" on provisions of

statute by Congress, and that a "statute which imposes a disability for purposes of punishment — that is to reprimand the wrongdoer, to deter others, etc. . . . has been considered penal". [356 U.S. at 94, 95]. See also, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

Of great significance regarding the Court's view of deportation was the following statement in *Trop, supra*, by Chief Justice Warren speaking for four Justices [356 U.S. at 98]:

> The Government argues that the sanction of denationalization . . . is not a penalty because deportation has not been so considered by this Court. While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country. . . . *this view of deportation may be highly fictional*, but even if its validity is conceded, it is wholly inapplicable to this case. [Emphasis supplied]

Petitioner submits that it is now time for the Court to reevaluate its view of deportation — especially in a situation such as the one at bar where a specified conviction makes an alien *per se* deportable — and to conclude that Section 241(a)(5) *supra* constitutes punishment imposed upon an alien for violation of 8 U.S.C. Section 1546.

Petitioner further submits that banishment from his home and adopted country constitutes punishment which is cruel and unusual under the standards set down in *Trop v. Dulles, supra*, and more recently by the Court in *Furman v. Georgia*, 408 U.S. 238 (1972). It is therefore respectfully requested that the validity of deportation as punishment and deterrance for a specific crime be reviewed by the Supreme Court in light of evolving standards of decency in a democratic society.

b. The Deportation of Petitioner Would Constitute the Imposition of an Additional Penalty for Conviction under 18 U.S.C. Section 1546 Based on Alienage, and Would Constitute a Denial of Due Process of Law and Equal Protection of the Laws

Petitioner submits that the Court should review the constitutional legality of subjecting permanent resident aliens to a greater penalty than are American citizens for conviction of the same offense. An American citizen convicted under 18 U.S.C. Section 1546 is subject only to a two thousand dollar fine or five years imprisonment, or both. An alien who is similarly convicted is liable not only to the specified fine and imprisonment, but is also liable to immediate deportation upon order of the Attorney General. For the reasons set out in the preceding section, such deportation is a penalty.

At this point in American legal history, there can be no doubt that the guarantee of due process of law in the Fifth Amendment contains within it a substantial element of equal protection of the laws. See, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States Department of Agriculture v. Moreno*, 93 S.Ct. 2821 (1973). It is also well established that the guarantee of equal protection of the laws applies both to citizens and to aliens who are lawful permanent residents. See, *Sugarman v. Dougall*, 93 S.Ct. 2842 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

As an alien subjected to greater punishment than a citizen for conviction under the same statute, petitioner asks the Court to review the disparity of treatment explicit in the relevant statutes in light of the developing concept of equality under the law. In this regard, it is submitted that the above cited cases, and other cases in the equal protection area such as *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Loving v. Virginia*, 388 U.S. 1 (1967) support the conclusion that the distinction which Congress has made between aliens and citizens

in *this* context is arbitrary, invidious, without rational basis and unconstitutional.

CONCLUSION

For all of the foregoing reasons, the decision below should not be permitted to stand, and in light of the compelling equities and important legal issues involved, it should be reviewed and reversed by this Court.

Respectfully submitted,

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